No. 18-966

In The Supreme Court of the United States

DEPARTMENT OF COMMERCE ET AL.,

Petitioners,

v.

STATE OF NEW YORK ET AL.,

Respondents.

On Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND ET AL. SUPPORTING RESPONDENTS

ALBERT GIANG
Counsel of Record
ZIWEI HU
MIGUEL A. GRADILLA
BOIES SCHILLER FLEXNER LLP
725 S. Figueroa Street, 31st Floor
Los Angeles, CA 90017-2463
Tel: (213) 629-9040
agiang@bsfllp.com

NAVDEEP SINGH
MEREDITH HIGASHI
RACHANA PATHAK
NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION
1612 K Street, Northwest, Suite 510
Washington, DC 20026-2849
Tel: (202) 775-9555

JERRY VATTAMALA
PATRICIA YAN
ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
99 Hudson Street, 12th Floor
New York, NY 10013-2815
Tel: (212) 966-5932

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICI CURIAE*[1]

This brief is submitted on behalf of the National Asian Pacific American Bar Association ("NAPABA"), the Asian American Legal Defense and Education Fund ("AALDEF"), and a coalition of other signatories committed to representing and serving the interests of the Asian American and Pacific Islander ("AAPI") community (collectively, "*Amici*"). *See* Appendix A. *Amici* routinely file briefs in cases in this Court and other courts on issues of significant concern for AAPI communities.

NAPABA is a national association of AAPI attorneys, judges, law professors, and law students, representing the interests of over eighty national, state, and local AAPI bar associations and nearly 50,000 attorneys who work in solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has served as a national voice for AAPIs in the legal profession and has promoted justice, equity, and opportunity for AAPIs. In furtherance of its mission, NAPABA opposes discrimination, including on the basis of race, religion, and national origin, promotes access to justice and legal

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

services, and promotes the equitable treatment of all under the law.

AALDEF, founded in 1974, is a New York-based national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF has monitored elections through annual multilingual exit poll surveys since 1988. Consequently, AALDEF has documented both the use of, and the continued need for, protection under the Voting Rights Act of 1965 ("VRA"). AALDEF has litigated cases around the country under the language access provisions of the VRA, and seeks to protect the voting rights of language minority, limited English proficient ("LEP"), and Asian American voters. AALDEF has litigated cases that implicate the ability of Asian American communities of interest to elect candidates of their choice, including lawsuits involving equal protection and constitutional challenges to discriminatory redistricting plans. *See, e.g.*, *Favors v. Cuomo*, 881 F. Supp. 2d 356 (E.D.N.Y. 2012); *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997); *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017); Complaint, *All. of South Asian Am. Labor v. The Bd. of Elections in the City of New York*, No. 1:13-cv-03732 (E.D.N.Y. July 2, 2013), ECF No. 1; Complaint, *Chinatown Voter Education All. v. Ravitz*, No. 1:06-cv-0913 (S.D.N.Y. Feb. 6, 2006, ECF No. 1.

Amici have longstanding histories of serving the interests of Asian Americans, Native Hawaiians, and

Pacific Islanders. *Amici* collectively represent vast swaths of AAPI communities and their work seeks to, among other things, politically empower the AAPI community, ensure that the AAPI community has meaningful access to legal services, and that limited English proficient communities have meaningful access to public services.

SUMMARY OF ARGUMENT

Amici represent and serve the interests of the many different subgroups and populations that constitute the broader AAPI community and submit this brief in support of Respondents. *Amici* agree with the district court's finding that the addition of a citizenship question will likely lead to an undercount of non-citizen households of *at least* 5.8 percent. *See New York, et al. v. United States Dep't of Commerce, et al.*, 351 F. Supp. 3d 502, 592 (S.D.N.Y. 2019). This chilling of participation in the 2020 Decennial Census ("2020 Census") will have a disproportionate effect on the AAPI community, which (1) would be uniquely harmed by the citizenship question, (2) would receive no countervailing benefit from the citizenship question, and (3) has historical concerns when governmental decision-making lacks transparency and fails to consider the needs of this fast-growing community.

First, the AAPI community would be uniquely harmed because it is comprised of large numbers of non-citizens, language minorities, and persons who

are otherwise hard to count in any census, all of whom are susceptible to the admitted chilling effect from a citizenship question.

Second, this particularized harm to the AAPI community is not outweighed by the government's purported interest in voting rights enforcement. The AAPI community has a proven track record of voting rights enforcement, without using citizenship data from the decennial census, and its efforts will be *stymied* by census undercounting that would make it harder to establish majority-minority districts.

Third, the AAPI community has historical experience with the misuse of census data—including the incarceration of Japanese Americans during World War II and the sharing of information pertaining to Arab Americans following 9/11—that counsels against deference to administrative decision-making about the citizenship question, which was rife with procedural anomalies.

These heightened concerns for the AAPI community come at a crucial moment, because Asian Americans are the fastest-growing racial group in the country and stand to make substantial gains in political representation based on that population growth. Therefore, *Amici* have a vested interest in opposing the addition of a citizenship question that will result in the undercounting of this growing community on the 2020 Census, and urge this Court to affirm the district court's decision.

ARGUMENT

I. The Asian American and Pacific Islander Community is a Recognized and Quickly-Growing Minority Group That Has a Vested Interest in Being Accurately Counted in the 2020 Census.

The AAPI[2] community is a growing, integral, and vibrant part of American society.[3] Despite enduring a painful history of exclusion, AAPI populations have grown consistently over the last half-century as the Immigration and Nationality Act of 1965—which abolished national origin quotas that favored migration from Europe and severely restricted migration from Asia and other non-European countries[4]—opened the

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[2] The Asian American and Pacific Islander community is diverse and contains persons from many regions, of differing ethnicities and religious backgrounds. The Census Bureau includes multiple regions and countries of origin, such as East Asia, South Asia, Southeast Asia, and the Pacific Islands, in this community. Throughout the brief, *Amici* use "AAPI" to refer collectively to the different segments of the broader AAPI community. Either "Asian American" or "Pacific Islander" used alone refers to each distinct subgroup. References to "Pacific Islander" include Native Hawaiians. Moreover, while *Amici* mostly use the singular "community" for ease of reference when describing AAPI communities, we acknowledge that there are many communities within that larger rubric.

[3] Beginning in 1978, Congress first officially recognized the contributions of the AAPI community through the initiation of "Asian/Pacific American Heritage Week." H.R.J. Res. 1007, 95th Cong., 92 Stat. 920 (1978). And in 1992, Congress, permanently designated each May as "Asian/Pacific Heritage Month." H.R. 5572, 102nd Cong., 106 Stat. 2251 (1992).

[4] Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911; *see also* Tom Gjelten, *In 1965, A Conservative*

doors to large-scale immigration from Asia to the United States.[5] Since then, the AAPI community has experienced rapid growth. Recent Census Bureau figures show that there are about 20 million AAPI persons in the United States, or about six percent of the national population.[6] Of this figure, 5.8 percent identify as Asian American and about 0.2 percent identify as Pacific Islander.[7] Between 1980 and 2000, the size of the Asian American community roughly quadrupled; between 2000 and 2015, it grew by seventy-two percent.[8] This makes the AAPI community the fastest growing of any major racial or ethnic group in the United States.[9] Asian Americans are projected to

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Tried To Keep America White. His Plan Backfired, NPR: Weekend Edition Saturday (Oct. 3, 2015, 6:57 AM), https://www.npr.org/2015/10/03/445339838/the-unintended-consequences-of-the-1965-immigration-act.

[5] D'Vera Cohn et al., Pew Research Center, *The Rise of Asian Americans* 9, 36 (2013), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2013/04/Asian-Americans-new-full-report-04-2013.pdf. ("*The Rise of Asian Americans*").

[6] U.S. Census Bureau, *Population Estimates*, July 1, 2017, https://www.census.gov/quickfacts/fact/table/US/?ST045217.

[7] *Id.* Given that some individuals may identify with more than one race or ethnicity, these percentages likely are higher.

[8] *The Rise of Asian Americans*, *supra* note 5, at 19; Gustavo López et al., Pew Research Center, *Key Facts About Asian Americans, a Diverse and Growing Population* (2017), https://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/. ("Key Facts About Asian Americans").

[9] *Key Facts About Asian Americans*, *supra* note 8.

become the largest immigrant group in the United States by 2055.[10]

The AAPI community not only is growing quickly, but is increasingly diverse. No single country of origin dominates, with persons of Chinese, Filipino, and Indian origin constituting the largest representative countries within the AAPI community.[11] Geographically, the community is spread throughout the United States, with the heaviest concentration—about forty-five percent of Asian Americans—living in the western United States.[12] As of 2015, Asian Americans comprised fifty-six percent of the population in Hawaii, sixteen percent of California, ten percent in New Jersey, ten percent in Nevada, and ten percent in Washington.[13] Although the AAPI community is concentrated in these states, other areas of the country are also experiencing increases in the AAPI population. Major cities in Arizona and Nevada are witnessing rapid growth in the AAPI population, while Chicago is home to twenty-eight percent of the Midwest's Asian American population and thirteen percent of its Pacific Islander population.[14] Significant AAPI populations also live in

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Meredith Higashi et al., National Asian Pacific American Bar Association, *Interpreting Justice: Progress and Challenges on Language Access, An Asian Pacific American Perspective* 9 (2017), https://cdn.ymaws.com/www.napaba.org/resource/resmgr/Language_Access/NAPABA_LanguageAccessReport_.pdf. ("*Language Report*").

Cleveland, Detroit, and Minneapolis-St. Paul.[15] The South is seeing similar growth. In North Carolina, for example, the AAPI population grew by eighty-five percent between 2000 and 2010, and in Georgia, by eighty-three percent.[16] And Arkansas and Alabama have seen a 151 percent and eighty-seven percent growth in their Pacific Islander population, respectively.[17]

Further, the AAPI community includes people who speak many languages,[18] with more than one hundred Asian and Pacific Islander languages and dialects spoken in the United States.[19] Seventy-seven percent of AAPIs speak a language other than English at home—more than any other population group.[20] Moreover, just over half of foreign-born Asian American adults either speak only English at home or speak English very well, resulting in almost half of this group primarily speaking languages other than English at home or having limited proficiency in English.[21] And of the 25.9 million individuals who are LEP, twenty-one percent are AAPI.[22]

Given the many international streams that feed into the broader AAPI community, a majority of Asian Americans are foreign-born, compared with the U.S.

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[15] *Id.*

[16] *Language Report*, *supra* note 14.

[17] *Id.*

[18] *The Rise of Asian Americans*, *supra* note 5 at 24.

[19] *Language Report*, *supra* note 14 at 9.

[20] *Id.*

[21] *The Rise of Asian Americans*, *supra* note 5 at 24.

[22] *Language Report*, *supra* note 14 at 9.

population overall.[23] Indeed, seventy-four percent of Asian American adults are foreign-born.[24] And a higher percentage of Asian Americans become naturalized citizens than all foreign-born adults in the United States.[25]

In short, the AAPI population is diverse and growing rapidly. The community embraces people who trace their origins to many countries and whose paths to the United States are as varied as the people who have walked them.

II. The Undercounting That Will Result From the Inclusion of a Citizenship Question in the 2020 Census Will Uniquely Harm the AAPI Community.

In this litigation, the district court found that adding a citizenship question to the 2020 Census would lead to an "incremental net decline in self-response rates of *at least* 5.8%" in non-citizen households. *See Dep't of Commerce*, 351 F. Supp. 3d at 592. The district court further acknowledged that such a decline in self-response rates would lead to an undercount in non-citizen households. *Id.* At trial, even Petitioners' attorneys conceded that adding a citizenship question to the census would cause a decline in self-response. *Id.* at 583. Such undercounting will jeopardize an accurate census count and have significant implications for all

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[23] *The Rise of Asian Americans*, *supra* note 5 at 23.

[24] *Id.*

[25] *Id.* at 24.

communities in the United States, especially the AAPI community.

A. The AAPI Community Has a Large Share of Non-citizens, Who Would Be Vulnerable to Undercounting as a Result of the Citizenship Question.

Despite having a high percentage of immigrants who choose to naturalize after coming to the United States, many AAPI persons reside in the United States under different immigrant and nonimmigrant statuses. To the extent that the inclusion of a citizenship question would chill responses from non-citizens—whether with or without legal status in the United States—the AAPI community would bear a significant portion of that harm.

The Department of Homeland Security ("DHS") reports that in 2017 about thirty-eight percent of all persons who became legal permanent residents ("LPR") were born in an Asian country.[26] This represented the largest group by region of LPRs' countries of origin.[27] In 2018, of the 533,557 immigrant visas the United States issued worldwide, 190,840 were allotted to people

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[26] U.S. Dep't of Homeland Security, *Yearbook of Immigration Statistics 2017, Table 3, Persons Obtaining Lawful Permanent Resident Status by Region and Country of Birth: Fiscal Years 2015 to 2017*, https://www.dhs.gov/immigration-statistics/yearbook/2017/table3.

[27] *Id.*

from Asia, or about thirty-six percent of the total.[28] This was an increase of about 21,000 immigrant visas from 2010.[29] Indeed, between 2001 and 2010, about 1.6 million immigrants entered the United States from an Asian country with an immigrant visa.[30] As for Pacific Islanders, between 2007 and 2009, fourteen percent of this subgroup in the United States were foreign-born.[31] In addition, some populations of Pacific Islanders, like the Marshallese community, have a special relationship with the United States. Citizens of the Republic of the Marshall Islands are covered under the Compact of Free Association ("COFA") and can freely enter, lawfully reside, and work in the United States, and are nonimmigrants distinct from other migrants.[32] An estimated 40,000 COFA migrants live in the United States.[33] Accordingly, the AAPI community consists of many non-citizens authorized to reside in the United States.

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[28] U.S. Dep't of State, *Report of the Visa Office (2018)*, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2018AnnualReport/FY18AnnualReport%20-%20TableIII.pdf.

[29] Asian Pacific American Legal Center et al., *A Community of Contrasts, Asian Americans in the United States* 19 (2011) https://www.advancingjustice-aajc.org/sites/default/files/2016-09/Community_of_Contrasts_US.pdf. ("Community of Contrasts").

[30] *Id.* at 19–20.

[31] *Id.*

[32] Pearl A. McElfish, *Marshallese COFA Migrants in Arkansas*, 112 J. Ark. Med. Soc'y 241, 259 (2016).

[33] *Id.*

Moreover, the AAPI community is comprised of a significant number of persons who remain unauthorized immigrants, making up about thirteen percent of the 11.1 million unauthorized immigrants who live in the United States.[34] For example, some of these unauthorized immigrants are eligible for Deferred Action for Childhood Arrival ("DACA"). The U.S. Citizenship and Immigration Services ("USCIS") reports that between 2012 and 2016, it approved the vast majority of the 37,089 requests for deferred removal action under DACA by persons of Asian origin from India, Pakistan, the Philippines, and South Korea.[35] Thus, the AAPI community also has a large share of unauthorized immigrants, who are most likely to remain silent and undercounted in the 2020 Census.

It is worth noting that the chilling effect from the inclusion of the citizenship question would not be limited to unauthorized immigrants. Unauthorized immigrants, like DACA recipients, are often in the same family as authorized immigrants and native-born Americans, making categorizing households by citizenship status a difficult task.[36] Between the large

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[34] *Key Facts About Asian Americans, supra* note 8.

[35] U.S. Dep't of Homeland Security, *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status 2012-2016 (Sept. 30)*, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2016_qtr4.pdf.

[36] Michael D. Nicholson et al., Center for American Progress, *The Facts on Immigration Today: 2017 Edition*, https://www.

number of naturalized citizens, authorized non-citizens, and unauthorized immigrants in the AAPI community, the majority of AAPI persons have direct experience with the United States immigration system, or have family with direct experience. Indeed, thirty-two percent of Asian American adults are non-citizens—both authorized and unauthorized.[37] Including a citizenship question could lead any person—even if he or she is a citizen—to think twice before discussing immigration status with the government,[38] for fear of exposing non-citizen relatives.

This risk of undercounting AAPI persons—citizen or non-citizen, authorized or unauthorized—would come at a crucial juncture for this community. If properly counted, the AAPI community stands to make great strides from the 2020 Census. Data collected through the census affects many critical aspects of American life, from allocating political representatives to distributing financial resources via federal assistance to states, localities, and families.[39] Accordingly, an accurate census count is essential to fairly allocate

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americanprogress.org/issues/immigration/reports/2017/04/20/430736/facts-immigration-today-2017-edition/.

[37] William H. Frey, *Commentary: These Are the Groups Most Likely to Stop Participating in the U.S. Census*, Fortune (Mar. 29, 2018), http://fortune.com/2018/03/29/us-citizenship-question-census/.

[38] *The Rise of Asian Americans*, *supra* note 5 at 118. Thirty-one percent of foreign-born Asian Americans say they came to the United States to reunite with family.

[39] U.S. Census Bureau, *Why We Conduct the Decennial Census* (2017), https://www.census.gov/programs-surveys/decennial-census/about/why.html.

resources and political representation for the next decade. Given the AAPI community's increasing presence in the United States, it is critically important that the 2020 Census accurately count its membership so that the community can be fully and properly represented in the myriad ways census data is used.

B. The AAPI Community Has a High Proportion of Persons Who Are Particularly Distrustful of the Census and Who Are Hard to Count.

As a baseline, the 2020 Census faces the prospect of low participation, even without the citizenship question. Published in January 2019, the 2020 Census Barriers, Attitudes, and Motivators Study Survey ("2020 CBAMS Survey") found that fewer than seven in ten households plans on responding to the census.[40] As the report concluded, "[t]his rate is cause for concern because the decennial census is designed to count every person in the United States, and actual response rates are often lower than intended response rates."[41] The 2020 CBAMS Survey further confirmed that many people believed, or were uncertain, "that the census is used to keep track of people who are in the country

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[40] Kyley McGeeney et al., U.S. Census Bureau, *2020 Census Barriers, Attitudes, and Motivators Study Survey Report: A New Design for the 21st Century* 1, 67 (2019), https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2020-report-cbams-study-survey.pdf). ("*CBAMS Survey*").

[41] *Id.* at 67.

without documentation or those who have committed a crime."[42]

Members of the AAPI community are particularly vulnerable to these concerns. Of all major minority groups in the United States, Asian Americans are the least familiar with the census[43] and are the least likely to fill out the census form.[44] This is particularly the case for younger, less educated Asian Americans.[45] Asian Americans also report being concerned that their answers to the census would not be confidential, and that the answers would be shared with other government agencies.[46] The Census Bureau itself acknowledged that fear of repercussions was one of the main reasons why people reported they would not respond to the census, with the most concerned groups being Asian Americans not proficient in English and those born outside the United States.[47]

Further, within the National Advisory Committee to the Census Bureau, the Administrative Records, Internet, and Hard to Count Population Working Group ("Working Group") issued a final report in July 2016 explaining the impact that a citizenship question will likely have on the AAPI community's participation in

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[42] *Id.*

[43] *Id.* at 32.

[44] *Id.* at 24–25.

[45] *Id.* at 1.

[46] *Id.* at 39–41.

[47] *CBAMS Survey*, *supra* note 40 at 2, 43–46.

the 2020 Census.[48] *First*, the AAPI community has a disproportionately large share of the subgroups that the Working Group has identified as particularly hard to count, such as "racial and ethnic minorities" and "persons who do not speak English fluently."[49] Indeed, nearly one in five Asian Americans live in a hard-to-count census tract.[50] *Second*, the Working Group acknowledged that Asian immigrants distrust the census because some come from countries that do not have a census system or have experienced harm resulting from such systems in their home countries.[51] *Third*, Asian immigrants are likely to live in "unconventional"

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[48] U.S. Census Bureau, Census Advisory Committees, Administrative Records, Internet, and Hard to Count Populations Working Group, *Final Report* (2016), https://www.census.gov/about/cac/nac/wg-admin_internet.html.

[49] The Census Bureau has considered the following groups as "[g]roups that have typically been harder to reach and/or enumerate": racial and ethnic minorities; persons who do not speak English fluently; lower income persons; homeless persons; undocumented immigrants; young mobile persons; children; persons who are angry at and/or distrust the government; LGBTQ persons. *See* U.S. Census Bureau, *National Advisory Committee on Racial, Ethnic, and Other Populations, Administrative Records, Internet, and Hard to Count Populations Working Group, Final Report* (July 19, 2016), https://www2.census.gov/cac/nac/reports/2016-07-admin_internet-wg-report.pdf. (*"Working Group Report"*).

[50] Leadership Conference Education Fund et al., *Will You Count? Asian Americans and Native Hawaiians and Pacific Islanders (NHPIs) in the 2020 Census* (April 17, 2018), http://civilrightsdocs.info/pdf/census/2020/Fact-Sheet-AA-NHPI-HTC.pdf.

[51] *Working Group Report*, *supra* note 49 at 8.

households with extended families, making them even harder to count.[52]

As for Pacific Islanders, the Working Group explained that this population may be difficult to enumerate due to, among other things, distrust of the U.S. government as well as inadequate explanations of why the census is necessary and what will be done with the collected data.[53] The distrust reported by AAPI persons is unsurprising as this sentiment is confirmed by the Census Bureau's own prior experience.[54] *See* Part IV *infra*. Further, many Pacific Islanders are either LEP, live in multi-family and multi-generational households, or live with uncertainty about immigration status.[55]

Tellingly, and in line with the issues identified by the Working Group, the 2020 CBAMS Survey recommends engaging multicultural partners to create an effective communications campaign to increase census participation.[56] Such efforts are necessary as AAPI populations have historically been at risk of being undercounted by the census.[57]

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[52] Twenty-six percent of Asians live in multigenerational households. *See Key Facts About Asian Americans*, *supra* note 8.

[53] *Working Group Report*, *supra* note 49 at 9.

[54] *See* Brief of Former Directors of the U.S. Census Bureau as *Amici Curiae* in Support of Appellees, *Evenwel v. Abbott*, 136 S.Ct. 1120 (2016) (No. 14-940).

[55] *Working Group Report*, *supra* note 49 at 9.

[56] *CBAMS Survey*, *supra* note 40 at 67.

[57] Thomas Mule, U.S. Census Bureau, *2010 Census Coverage Measurement Estimation Report: Summary of Estimates of*

Thus, the Census Bureau was aware of the existing barriers to census participation within the AAPI community. Yet none of these concerns appear to have been considered in Secretary Wilbur Ross's ("the Secretary") ultimate decision to add the citizenship question. Including an untested citizenship question in the 2020 Census risks exacerbating the problems the Census Bureau itself identified early on as affecting the AAPI community in particular.

C. The AAPI Community Is Comprised of Many Different Language Minorities, Who Are Especially Vulnerable to the Downstream Harms of Undercounting.

In 2000, just over thirty-nine percent of Asian Americans were not proficient in English.[58] Recent estimates show that three-quarters of Asian Americans speak a language other than English at home, with thirty-five percent of this population qualifying as LEP.[59] Pacific Islanders also have high rates of limited English proficiency.

These statistics demonstrate that serving the needs of AAPI populations hinges on adequate language support, which in turn depends on the financial

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Coverage for Persons in the United States 15 (2012), https://www.census.gov/coverage_measurement/pdfs/g01.pdf.

[58] *See* James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. Legis. & Pub. Pol'y 195, 197 (2006).

[59] *Working Group Report*, *supra* note 49 at 8.

assistance that flows from accurate census counting. For example, members of the AAPI community rely on the services of legal aid organizations for assistance addressing housing claims, domestic violence, and human trafficking.[60] Organizations that serve these populations use census data to determine language and outreach needs to identify how to better serve the community. And many of these legal organizations are funded by the Legal Services Corporation ("LSC"), a congressionally chartered organization that is statutorily required to use census data to determine the amount of funds available for legal aid programs in geographic areas across the country.[61] Of the approximately two million individuals served by the LSC, over 23,000 identify as AAPI.[62] An inaccurate census count could result in inappropriate funding allocations to LSC-funded organizations, and lead to misidentifying the language needs of the populations LSC-funded organizations serve, including AAPI communities.

Language barriers can also impact the fundamental right to vote. For this reason, Congress sought to provide protections to language minority voters through Section 203 of the VRA. Under Section 203, jurisdictions[63] must provide language assistance to a

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[60] Asian Pacific American Legal Resource Center, *APALRC 2017 Program Report*, http://www.apalrc.org/apalrc-2016-program-report/.

[61] Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

[62] *Language Report*, *supra* note 14 at 46.

[63] The VRA defines a jurisdiction or political subdivision as the unit of government in charge of voter registration. *See*

language minority if the population includes either: (1) five percent or more of voting-age citizens who are LEP; or (2) more than 10,000 voting-age citizens who are LEP, and the rate of total voting-age citizens that are LEP and have less than a fifth grade education is higher than the national rate.[64] A recent study found that 138 jurisdictions around the country are within 2.5 percentage points of the five percent voting-age LEP citizen ("VACLEP") cutoff for VRA coverage, and/or within 5,000 persons of the 10,000 population threshold.[65] The study also found that "Asian language groups are far more likely to be close to coverage under the population threshold."[66] Given that Asian language groups are likely to be close to meeting the thresholds for Section 203 protections, accurately counting the AAPI community is imperative so that the minority language protections function as intended.

These voting protections are particularly important to ensure that the political gains the AAPI community has made are sustained. Last year saw the highest number of AAPI persons ever elected

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Bernard Fraga and Julie Lee Merseth, *Examining the Causal Impact of the Voting Rights Act Language Minority Provisions*, J. Race, Ethnicity, and Politics, 1, 37 n.4 (2016).

[64] U.S. Census Bureau, Dep't of Commerce, *Decennial Census of Population and Housing, Section 203 Language Determinations* (2017), https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/voting-rights-determination-file.html.

[65] Fraga and Merseth, *supra* note 63 at 1, 41.

[66] *Id.* at 41.

to Congress: twenty.[67] Ensuring robust political representation will also help ensure that critical services, such as LSC-funded legal aid, reach vulnerable AAPI persons. And such representation will only materialize if voter protections, including the language minority provisions of Section 203, are implemented. This progress will be threatened, however, if the AAPI community is undercounted in the 2020 Census.

III. The Concrete Harms From the Inclusion of the Citizenship Question Would Not Be Outweighed by Any Real Benefits, and Would Actually Undermine the Stated Goal of Enforcing Voting Rights.

Including a citizenship question on the 2020 Census would not only result in vast undercounts of the AAPI community, but would also undermine the purported purpose for which the citizenship question is being included—full enforcement of Section 2 of the VRA by the Department of Justice ("DOJ").

There is no question that the VRA has been an effective tool to protect against discrimination in voting for communities of color and language minority groups all across the country, including for Asian American and LEP voters. For many years, Asian Americans have effectively used Sections 2, 203, 208, and 5 of the

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[67] Agnes Constante, *For Second Congress In a Row, Elected Asian Americans and Pacific Islanders Hit New High*, NBC News (Dec. 26, 2018 5:35 AM), https://www.nbcnews.com/news/asian-america/second-congress-row-elected-asian-americans-pacific-islanders-hit-new-n950371.

VRA to protect their communities from discrimination in voting, using existing American Community Survey ("ACS") data.[68]

While *Amici* would welcome robust enforcement of the VRA by the DOJ, *Amici* are aware of no new cases brought by the current DOJ administration under Section 2 (or any provision) of the VRA.[69] By contrast, prior to January 2017, the DOJ has extensively and successfully enforced the VRA to protect communities of color, including the Asian American community.[70]

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[68] *See, e.g.*, *Huot v. City of Lowell*, 280 F. Supp. 3d 228 (D. Mass. 2017); *Chinese Progressive Association v. City of Boston*, No. 1:06-cv-11598 (D. Mass. 2005); *Favors*, 881 F. Supp. 2d 356; *Diaz*, 978 F. Supp. 96; *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017); *All. of South Asian Am. Labor v. The Bd. of Elections in the City of New York*, No. 1:13-cv-03732 (E.D.N.Y. 2013); *Chinatown Voter Educ. All. v. Ravitz*, No. 06-cv-0913 (S.D.N.Y. 2006).

[69] *See* U.S. Dep't of Justice, *Voting Section Litigation, Cases Raising Claims Under Section 2 of the Voting Rights Act*, https://www.justice.gov/crt/voting-section-litigation (last updated Sept. 27, 2018) ("*Voting Section Litigation*"). The DOJ's last listed complaint under Section 2 of the VRA was filed on January 10, 2017, before former Attorney General Jeff Sessions was sworn into office. As far as *Amici* are aware, the only VRA-related action taken by the current DOJ administration was the voluntary *withdrawal* of a key argument in a Section 2 discriminatory purpose claim in an existing case involving Texas voter identification laws. The court granted the DOJ's motion, but specifically rejected the basis of DOJ's given reasoning for withdrawing the claim. *See Veasey v. Abbott*, 248 F. Supp. 3d 833 (S.D. Tex. 2017).

[70] *See Voting Section Litigation, supra* note 69 (listing cases in which the DOJ has enforced the VRA to protect the AAPI community, including *United States v. City of Boston, MA*, No. 05-11598 (D. Mass. 2005) (protecting the Chinese and Vietnamese

Indeed, since Congress enacted the VRA in 1965, the short form decennial census has *never* included a citizenship question, yet prior DOJ administrations have been able to effectively enforce the VRA for decades. From 2000 through January 2017, for example, the DOJ brought thirty cases under Section 2 of the VRA alone.[71] It is therefore unsurprising that former Acting Attorney General for the DOJ's Civil Rights Division John Gore conceded in his deposition in this litigation that the DOJ does not need citizen voting-age population ("CVAP") data to enforce the VRA.[72]

In 1975, when Congress extended the VRA to cover "language minorities" such as Asian Americans, it recognized that "[d]iscrimination against Asian Americans is a well-known and sordid part of our

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communities); *United States v. City of Hamtramck, MI*, No. 00-73541 (E.D. Mich. 2000) (Arabic and Bengali); *United States v. Alameda County, CA*, No. 11-3262 (N.D. Cal. 2011) (Chinese); *United States v. City of Walnut, CA*, No. 07-2437 (C.D. Cal. 2007) (Chinese and Korean); *United States v. City of Rosemead, CA*, No. 05-5131 (C.D. Cal. 2005) (Chinese and Vietnamese); *United States v. San Diego County*, No. 04-1273 (S.D. Cal. 2004) (Filipino and Vietnamese)).

[71] *See Voting Section Litigation*, *supra*, note 69.

[72] Dan M. Clark, *Deposition of DOJ Official in Census Suit Admits Citizenship Query Might Be Unnecessary*, New York Law Journal (Nov. 6, 2018 2:39 PM), https://www.law.com/newyorklawjournal/2018/11/06/deposition-of-doj-official-in-census-suit-admits-citizenship-query-might-be-unnecessary/ ("'You agree, right, Mr. Gore, that CVAP data collected through the census questionnaire is not necessary for DOJ's VRA enforcement efforts?' Ho asked. 'I do agree with that. Yes,' Gore replied.")

history."[73] Section 203 includes these language provisions of the VRA, which "provide language assistance during elections for certain language minority groups."[74] Like many Section 2 cases, Section 203 cases utilize citizenship data in their calculations.[75] AALDEF, has litigated extensively under the VRA and Section 203 in particular. In AALDEF's considerable enforcement experience on behalf of the Asian American community, the already-available ACS citizenship data has been not only sufficient for VRA claims, but even preferable in providing more up-to-date data than decennial census data. In light of rapid population growth, particularly for the Asian American community,[76] decennial census data has the inherent drawback of only being collected every ten years, and in many instances might be outdated by the time of litigation under Section 2 of the VRA.[77] ACS data, on the

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[73] S. Rep. No. 94-295 at 28 n.21 (1975); 42 U.S.C. §§ 1973b(f), 1973l(c)(3); *see also* S. Rep. No. 94-295, at 28–30 (noting that "language minority citizens have been the target of discrimination in almost every facet of life").

[74] U.S. Census Bureau, *Section 203 Language Determinations* (2017), https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/voting-rights-determination-file.html.

[75] When Congress reauthorized and extended these language provisions of the VRA in 2006, it specifically instructed the Census Bureau to shift to the use of ACS data and conduct more frequent determinations than those of the decennial census. *See id.*

[76] *See supra* Part I.

[77] According to the Census "Population Clock," as of July 2018, the United States has a "[n]et gain of one person every 18 seconds." U.S. Census Bureau, U.S. and World Population Clock, https://www.census.gov/popclock/ (last visited Mar. 27, 2019).

other hand, is calculated more frequently[78] and thus better captures data for the fastest-growing demographic groups.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court set out the requirements for racial or language minority groups to bring successful claims under Section 2 of the VRA. Historically, Asian Americans have been unable to satisfy the first threshold requirement of *Gingles*, which requires the minority group "to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district."[79] *Id.* at 50. For many years, Asian Americans have not had sufficient population sizes to form the majority of a legislative district.

Such population growth would certainly add up over the ten years between decennial censuses.

[78] *See* U.S. Census Bureau, Dep't of Commerce, *American Community Survey (ACS)*, https://www.census.gov/programs-surveys/acs/data.html (last visited Mar. 27, 2019).

[79] ACS data collected throughout the decade would be more accurate to calculate potential majority districts than decennial census data. Many non-citizens naturalize throughout the course of a decade. Lawful permanent resident immigrants typically become eligible for naturalization in five years. The waiting period is four years for asylees who have permanent resident status and three years for spouses of U.S. citizens. For fiscal years 2011-2017, over 1.8 million Asian immigrants naturalized in the United States. An average of 257,750 Asian immigrants naturalized in the U.S. in each of those years. *See* U.S. Dep't of Homeland Security, *Profiles on Naturalized Citizens: 2011-2017 Country of Birth*, https://www.dhs.gov/profiles-naturalized-citizens (last visited Mar. 30, 2019)

Discriminatory immigration policies and quotas kept the Asian American population relatively low, until the Immigration and Nationality Act of 1965 finally allowed Asian immigrants to enter the United States in substantial numbers.[80] Since then, the AAPI community has become the nation's fastest growing racial group of the 2010 census,[81] with about 21.4 million people by 2016.[82]

The 2020 census, if conducted properly, could be the first census to yield Asian American or AAPI *Gingles* majorities in a substantial number of jurisdictions around the country at the congressional, state senate, state assembly/house, city council, and/or school board legislative district levels.[83] Including the citizenship question on the 2020 Census—despite having sufficient ACS citizenship data—will likely have the effect of undercounting existing Asian American majority districts that can currently bring Section 2

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[80] *See infra* note 85.

[81] *See* U.S. Census Bureau, Dep't of Commerce, *The Asian Population: 2010*, at 1, 4 (2012), https://www.census.gov/prod/cen2010/briefs/c2010br-11.pdf.

[82] U.S. Census Bureau, Dep't of Commerce, *FFF: Asian-American and Pacific Islander Heritage Month: May 2018*, https://www.census.gov/newsroom/facts-for-features/2018/asian-american.html (last updated August 3, 2018).

[83] The 2010 Census yielded a modest number of Asian majority districts at various legislative district levels around the country. The 2020 Census could likely yield many more potential Asian majority districts in multiple jurisdictions. *See* U.S. Census Bureau, *The Asian Population: 2010*, at 13, Table 4 (2012), https://www.census.gov/prod/cen2010/briefs/c2010br-11.pdf.

claims, as well as preventing potential Asian American or AAPI-majority districts from being created in the future for Section 2 claims.[84]

In short, the likely harms from adding a citizenship question to the 2020 Census are not outweighed by any real benefit in terms of voting rights enforcement. Based on *Amici*'s experience, ACS citizenship data has always been sufficient to enforce the VRA to protect Asian American voters, and has been particularly effective in capturing the rapid growth of our community. In fact, adding a citizenship question to the decennial census would actually undermine the purported reason for doing so—enforcing Section 2 of the VRA—at the exact historical moment when many Asian American communities could potentially satisfy the threshold requirement of the *Gingles* test to bring a Section 2 claim, for the first time. A thorough vetting of the costs and benefits of a citizenship question would have recognized these additional harms—including the weakening of Asian Americans' ability to enforce voting rights, at a moment when that ability should be strengthened—and would have eroded any proffered justifications based on VRA enforcement.

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[84] *See supra* Part II.A.

IV. The Abnormalities in the Administrative Process Raise Concerns About Lack of Governmental Transparency, a Matter of Historical Importance to the AAPI Community.

Given the history of exclusion[85] and discrimination[86] against AAPI subgroups in the United States, *Amici* are especially concerned about the procedural anomalies in the administrative processes that led to the Secretary's decision to add a citizenship question to the 2020 Census. The Secretary made this decision despite substantial evidence that the question would depress turnout for non-citizen and minority communities, including the AAPI community. *See* Part II *supra*. This undercounting not only was found to violate the Administrative Procedure Act and the Enumeration

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[85] Until 1943, federal policy barred immigrants of Asian descent from even becoming United States citizens, and it was not until 1952 that racial criteria for naturalization were removed altogether. *See* Chinese Exclusion Act of 1882, Pub. L. No. 58-61, ch. 126, 22 Stat. 58, 58-61 (prohibiting immigration of Chinese laborers; repealed 1943); Immigration Act of 1917, Pub. L. No. 874-98, ch. 29, 39 Stat. 874, 874-98, and Immigration Act of 1924, ch. 190, 43 Stat. 153 (banning immigration from almost all countries in the Asia-Pacific region; repealed 1952). It was not until 1965 that Congress eliminated anti-Asian immigration quotas. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

[86] *Terrace v. Thompson*, 263 U.S. 197 (1923), upheld the Alien Land Laws that precluded persons of Asian descent from owning land. *Gong Lum v. Rice*, 275 U.S. 78 (1927) upheld the segregation of a Chinese American schoolgirl, finding that she had not been denied equal protection under the Fourteenth Amendment because she could attend a school for colored children.

Clause; it uncomfortably echoes the AAPI community's experience of exclusion, discrimination, and, at the very least, is passive neglect of the AAPI community's needs and rights.

Indeed, the specter that a citizenship question could deter participation in the 2020 Census is particularly concerning to the AAPI community, given its long and difficult journey to become eligible for American citizenship in the first place.[87] When Congress enacted the first naturalization statute in 1790, it restricted the right of naturalization to "any alien, being a free white person."[88] The next three iterations of the naturalization statute in 1792, 1795, and 1802 likewise explicitly limited the right of naturalization to "free white person[s]."[89] Although the Naturalization Act of 1906 did not explicitly limit the right of naturalization to "white persons" nor categorically exclude any racial or ethnic group, this Court determined that only "white persons" who were of European descent were eligible for naturalization and specifically held that individuals of Japanese and Indian ancestry could not become naturalized citizens. *See Takao Ozawa v.*

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[87] *See generally* Charles J. McClain, *Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship*, 2 Asian L.J. 33 (1995).

[88] Naturalization Act of 1790. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795).

[89] Naturalization Act of 1795, 1 Stat. 414; Naturalization Act of 1798, 1 Stat. 566; Naturalization Law of 1802, 2 Stat. 153. In 1870, Congress extended the naturalization laws to "aliens of African nativity and to persons of African descent." *See* Naturalization Act of 1870, 16 Stat. 254.

United States, 260 U.S. 178 (1922); *United States v. Thind*, 261 U.S. 204 (1923). Congress did not repeal the remnants of the "free white persons" naturalization restriction until it passed the Immigration and Nationality Act of 1952.[90] Thus, the United States has excluded individuals of Asian and Pacific Islander ancestry from naturalization for the vast majority of the time it has existed as a nation.

In *Evenwel v. Abbott*, four former Census Bureau officials informed this Court that the Bureau "has had to contend with significantly increased distrust, based on concerns about government intrusion and privacy" and wrote that "a citizenship inquiry would invariably lead to a lower response rate to the Census."[91] According to a 2001 report prepared by the Census Bureau, confidentiality of census data has long been a concern for Americans, despite the Bureau's confidentiality obligations and practice of avoiding disclosure.[92] Although Petitioners and at least one amicus brief filed in their support[93] cite this prohibition on the sharing

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[90] *See* Pub. L. 82-414, 66 Stat. 163 (1952).

[91] *See* Brief of Former Directors of the U.S. Census Bureau, *supra* note 54.

[92] U.S. Census Bureau, Dept. of Commerce, *A Monograph on Confidentiality and Privacy in the U.S. Census*, July 2001, https://www.census.gov/history/pdf/ConfidentialityMonograph.pdf. ("*Confidentiality Monograph*").

[93] *See, e.g.*, Brief of Oklahoma et al., as *amici curiae* in Support of Petitioners in *New York v. Dep't of Commerce*, Case No. 18-966.

of data,[94] they ignore what social science data and former Census Bureau officials have warned about the lack of trust in the Bureau's ability to comply with its confidentiality obligations. Nor do they acknowledge that the Bureau has admitted that it has breached these obligations in the past.[95] Two lamentable disclosures of census data have impacted the AAPI community in particular.

First, for many individuals in the AAPI community, especially those of Japanese descent, much of the distrust towards the Census Bureau is rooted in the Bureau's role in facilitating the forcible removal and incarceration[96] of Japanese Americans during World War II, as detailed in the Bureau's own 2001 report.[97] Notably, Congress enacted the Second War Powers Act

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[94] According to 13 U.S.C. § 9, the Bureau is prohibited from publishing private information, and the Bureau's employees are sworn to protect confidentiality.

[95] *See generally Confidentiality Monograph*, *supra* note 92.

[96] The Japanese American Citizens League has provided guidance on the most appropriate language to describe the experience of Japanese Americans during World War II. National Japanese American Citizens League, *Power of Words Handbook* (2015), https://jacl.org/wordpress/wp-content/uploads/2015/01/Rev.-Term.-Handbook.pdf.

[97] *See generally Confidentiality Monograph*, *supra* note 92; *see also* J.R. Minkel, *Confirmed: The U.S. Census Bureau Gave Up Names of Japanese-Americans in WWII* (Mar. 30, 2007), https://www.scientificamerican.com/article/confirmed-the-us-census-b/?amp("Minkel"). For a more detailed discussion, see the brief filed by the Korematsu Center as *amici curiae*, *New York v. Dep't of Commerce*, No. 18-5025 (S.D.N.Y. 2018).

in 1942, which effectively overrode the Census Bureau's confidentiality obligations,[98] and made census data available to "any branch or agency of the Government . . . for use in connection with the conduct of the war."[99] According to a 1980 memorandum written by former Bureau director Vincent Barraba, the 1940 census data was "the single most important source of information used for evacuation and resettlement purposes."[100] Further, former Census Bureau Director Kenneth Prewitt stated in 2001 that "[t]he historical record is clear that senior Census Bureau staff proactively cooperated" with the incarceration of Japanese Americans, and "that the census tabulations were directly implicated in the denial of civil rights to citizens of the United States who also happened to be of Japanese ancestry."[101] Prewitt apologized for the Census Bureau being "less than forthcoming in publicly acknowledging its role" in the incarceration process for many years, and acknowledged that the incarceration

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[98] In 1910, President William Taft issued a Proclamation in advance of the thirteenth decennial census stating that "[t]he sole purpose of the census is to secure general statistical information regarding the population and resources of the country. . . . There need be no fear that any disclosure will be made regarding any individual person or his affairs." https://www.census.gov/2010census/news/pdf/1910_census.pdf; *see also* U.S. Census Bureau, *Events in the Chronological Development of Privacy and Confidentiality in the U.S. Census Bureau*, https://www.census.gov/history/pdf/PrivConfidChrono.pdf.

[99] Minkel, *supra* note 97.

[100] *Confidentiality Monograph*, *supra* note 92 at 15.

[101] *Id.* at 16.

of Japanese Americans "was a sad, shameful event in American history."[102]

Second, a more recent example of the Census Bureau sharing its data occurred during the aftermath of 9/11, which has been compared to the incarceration of Japanese American citizens.[103] In response to requests from DHS, in August 2002 and December 2003, the Census Bureau provided specially tabulated population statistics on Arab Americans to DHS, including detailed information on how many people of Arab backgrounds live in certain zip codes, sorted by country of origin.[104] Although Bureau officials maintain that such data sharing was legal and justified by the PATRIOT Act,[105] this repeated pattern of compromising confidentiality in the name of national security eroded public confidence and resulted in trust in the Government

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[102] *Id.*

[103] *See, e.g.*, Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L.Rev. 1575 (2002); Harold Hongju Koh, *The Spirit of the Laws*, 43 Harv. Int'l L.J. 23, 33-39 (2002).

[104] Lynette Clemetson, *Homeland Security Given Data on Arab-Americans*, New York Times, July 30, 2004, https://www.nytimes.com/2004/07/30/us/homeland-security-given-data-on-arab-americans.html.

[105] *See id.* In the post-9/11 environment, the experiences of the AAPI and the Arab, Middle Eastern, and North African communities are recognized as a common, collective experience due to shared impacts, perception, and organizing. Further, the AAPI community includes a large number of Muslims and those perceived to be Muslim or Arab. For example, programs like the National Security Entry-Exit Registration System included both Asian and Middle Eastern countries that were Muslim majority.

reaching an all-time low.[106] As Prewitt recently noted, "I think the Census Bureau has to bend over backwards to maintain the confidence and trust of the public."[107] The addition of a citizenship question, as discussed above, will only continue undermining public trust in the Census Bureau.[108]

This history must temper any deference given to governmental explanations for the collection of citizenship data, and governmental promises not to disclose such data. And the AAPI community has historical reason to be wary of, and to advocate careful scrutiny of, lack of transparency in governmental decision-making processes. This is particularly true where, as here, the district court found ample evidence in the record here that the Secretary did not adequately consider (or worse, disregarded) the potential impact on noncitizens and other minority groups.

Here, the procedural irregularities prior to the Secretary's decision and in the proceedings before the district court are troubling. The federal government has recognized Asian Americans and Pacific Islanders as minority groups deserving of protection.[109] Yet

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[106] *See* Pew Research Center, *Public Trust in Government: 1958-2017* (Dec. 14, 2007), https://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/.

[107] Minkel, *supra* note 97.

[108] *Id.*

[109] As noted above, Congress, in passing the VRA, described the historical justification for including Asian Americans in the legislation as follows: "Discrimination against Asian Americans is a well-known and sordid part of our history." Voting Rights Act

neither the Secretary's March 26, 2018 Memorandum,[110] announcing the reinstatement of a citizenship question, nor his June 21, 2018 Supplemental Memorandum,[111] make any mention of how including the citizenship question would affect the AAPI community. And despite uncontroverted evidence that the Secretary began contemplating the addition of a citizenship

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of 1965, S. Rep. No. 94-295 at 28-30, 28 n.21 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 794-96. The Department of Labor has explicitly recognized Asian Americans as a "traditionally underserved population." 29 U.S.C. § 718. Moreover, various components of the federal government have recognized and documented the challenges faced by the AAPI community, including the Equal Employment Opportunity Commission, which released a special report on Asian Americans in the American workforce: Equal Employment Opportunity Commission, *Asian Americans in the American Workforce*, https://www.eeoc.gov/eeoc/statistics/reports/american_experiences/asian_americans.cfm; and the Department of Education Office for Civil Rights, the Department of Justice Civil Rights division, and the White House Initiative on Asian Americans and Pacific Islanders, which issued a joint fact sheet specific to enforcing civil rights actions on behalf of AAPI students: U.S. Dep't of Justice, U.S. Dep't of Education White House Initiative on Asian Americans and Pacific Islanders, *Combatting Discrimination Against AANHPI and MASSA Students*, https://www2.ed.gov/about/offices/list/ocr/docs/aanhpi-massa-factsheet-201606.pdf.

[110] In his March 26, 2018 memorandum requesting a citizenship question on the 2020 Census, the Secretary included very limited analysis of how the citizenship question could affect different minority groups. Notably, the entire memorandum contained no analysis or mention of the potential impact of a citizenship question on Asian Americans or the AAPI community. *See* Pet. App. 548a-563a.

[111] *See* Pet. App. 546a-547a.

question as early as March 2017,[112] the Commerce Department did not test the question in accordance with standard social science and statistical practices before the Secretary issued his March 26, 2018 Memorandum.[113] Indeed, that Memorandum ran contrary to much of the advice and recommendation provided by Census Bureau officials.[114]

Although the Census Bureau continues to maintain that it is bound by its Title 13 obligations, *see* 13 U.S.C. § 1, *et seq.*, and will not share any of the data it collects in the 2020 Census, this litigation has uncovered an open question about whether the PATRIOT Act supersedes Title 13. In January 2010, the Justice Department's Office of Legal Counsel ("OLC") issued an opinion finding that no provisions of the PATRIOT Act would compel the Secretary of Commerce to disclose protected census information to federal law

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[112] *See* 351 F. Supp. 3d at 569 (citing deposition testimony of Earl Comstock).

[113] *See id.* at 541 (noting that the Secretary had concluded that the "citizenship question has been well tested" without detailing any such testing or addressing how the testing would apply on the 2020 decennial census questionnaire); 558-561 (describing the Census Bureau's standard process for testing census questions and that Census Bureau experts who testified concluded that the question was not adequately tested for purposes of the decennial census questionnaire).

[114] *See id.* at 647-58 (explaining that the Secretary's explanations "were unsupported by, or even counter to, the evidence before the agency").

enforcement or national security officers where such disclosure would otherwise be prohibited by the Census Act, 13 U.S.C. §§ 8, 9, 214.[115] This administration has not provided a clear answer as to whether it agrees with the stance taken by the Justice Department in 2010, as indicated in a June 12, 2018 email from Ben Aguiñaga, a former Justice Department attorney, who advised then Acting Assistant Attorney General for Civil Rights John Gore that "I don't think we want to say too much there in case the issues addressed in the OLC opinion or related issues come up later for renewed debate."[116] When Gore was deposed in connection with the proceedings before the district court, he declined to answer questions about this topic, on the grounds of the deliberate process privilege.[117] The Justice Department's vague responses provide no assurance that, once again, national security will not be

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[115] Census Confidentiality and the PATRIOT Act, Memorandum Opinion for the General Counsel, Department of Commerce, January 4, 2010, https://www.justice.gov/sites/default/files/olc/opinions/attachments/2016/03/18/2010-01-04-census-confidentiality.pdf.

[116] Hansi Lo Wang, *DOJ Asked About Census Confidentiality, Crafted Intentionally Vague Answer*, NPR (Nov. 19, 2018, 10:09 PM), https://www.npr.org/2018/11/19/669378077/confidentiality-of-responses-to-u-s-census-may-come-up-for-renewed-debate.

[117] *Id.* (citing deposition testimony of John Gore).

used to justify the sharing of purportedly confidential data.[118]

CONCLUSION

As the record before this Court makes clear, adding a citizenship question to the 2020 Census is unnecessary and will likely cause lasting harm to minority communities, including the AAPI community. Petitioners have failed to demonstrate the need for a question that would outweigh the admitted effects from the undercounting of non-citizens, including many AAPI persons. As argued by Respondents, affirming the district court's decision is the faithful application of the Constitution and the Administrative Procedure Act, as it would signal that government decision-making must be transparent, rational, and lawful. *Amici* add that affirming the decision below will protect the AAPI community by ensuring that its members will

[118] On December 12, 2018, a group of social science organizations whose members include census data users from the public, private, and academic sectors wrote a letter to the Secretary expressing their concerns regarding census confidentiality. *See* Population Association of America, *PAA Urges U.S. Commerce Secretary to Protect Census Data Confidentiality* (Dec. 12, 2018), https://www.populationassociation.org/2018/12/12/paa-urges-u-s-commerce-secretary-to-protect-census-data-confidentiality/.

be properly counted and included in the 2020 Census. Accordingly, *Amici* respectfully ask that this Court affirm the district court's decision.

Respectfully submitted,

ALBERT GIANG
Counsel of Record
ZIWEI HU
MIGUEL A. GRADILLA
BOIES SCHILLER FLEXNER LLP
725 S. Figueroa Street,
31st Floor
Los Angeles, CA 90017-2463
Tel: (213) 629-9040
agiang@bsfllp.com

NAVDEEP SINGH
MEREDITH HIGASHI
RACHANA PATHAK
NATIONAL ASIAN PACIFIC
AMERICAN BAR ASSOCIATION
1612 K Street, Northwest,
Suite 510
Washington, DC 20026-2849
Tel: (202) 775-9555

JERRY VATTAMALA
PATRICIA YAN
ASIAN AMERICAN LEGAL
DEFENSE AND
EDUCATION FUND
99 Hudson Street, 12th Floor
New York, NY 10013-2815
Tel: (212) 966-5932

Counsel for Amici Curiae

APPENDIX A

LIST OF ADDITIONAL *AMICI CURIAE*

ORGANIZATIONAL AMICI

American Citizens for Justice/Asian American Center for Justice opposes discrimination, including on the basis of race, religion, and national origin, and promotes the equitable treatment of all under the law. We therefore oppose the citizenship question on the census.

The **Arizona Asian American Bar Association** is a voluntary bar association for individuals of all backgrounds, including attorneys, judges, law professors, law students, and community members with an interest in the Arizona legal profession. Our vision is to promote and advocate for justice, equity, equality, inclusion, and opportunity for AAPIs in the Arizona legal profession and the community-at-large.

The **Asian & Pacific Islander American Health Forum** ("APIAHF") influences policy, mobilizes communities, and strengthens programs and organizations to improve the health of over 20 million Asian Americans, Native Hawaiians, and Pacific Islanders. APIAHF supports a fair and accurate census count of all persons living the United States and opposes discriminatory policies that seek to undermine that count and impact the health and well-being of the nation.

The **Asian American Bar Association of Greater Chicago's** mission includes promoting the professional growth of our members; mentoring law students

and new lawyers, providing services to our local community; fostering the exchange of ideas and information among our members and community leaders; partnering with other minority organizations on common matters of concern; and offering policy recommendations on legal, social, political, and economic interests significant to our community.

The **Asian American Bar Association of Houston** ("AABA-Houston") is a voluntary organization of attorneys, judges, and law students of Asian heritage or who have Asian American interests. Founded in 1984, the AABA-Houston's membership reflects all aspects of Houston's Asian American legal community. In coordinating social events, continuing legal education, and pro bono and volunteer opportunities, the AABA-Houston promotes the Houston society of Asian American lawyers and addresses the needs of Houston's Asian American community.

The **Asian American Bar Association of New York** ("AABANY") was formed in 1989 as a not-for-profit corporation to represent the interests of New York Asian American attorneys, judges, law professors, legal professionals, legal assistants, paralegals, and law students. The mission of AABANY is to improve the study and practice of law, and the fair administration of justice for all by ensuring the meaningful participation of Asian Americans in the legal profession. AABANY also seeks to advocate for and promote the Asian American community in New York, opposes discrimination in any form and supports equal justice for all under the law.

Established in 1992, the **Asian American Bar Association of Ohio** ("AABAO") is the oldest association of AAPI attorneys in Ohio. AABAO strives to foster a high level of professional achievement, participation, and responsiveness among its members in legal and law-related fields; to encourage the active participation of its members in the greater community; to support the professional growth and advancement of its members; and to promote awareness of the issues and concerns facing the AAPI legal community and the AAPI community-at-large.

The **Asian American Bar Association of the Greater Bay Area** ("AABA-Bay Area") has been the voice of the San Francisco Bay Area's AAPI legal community since 1976, and is the oldest and largest pan-Asian bar association in the United States. AABA-Bay Area advocates for civil rights, representation, and equality, and in furtherance of its mission, opposes discrimination on the basis of race, religion, and national origin.

The **Asian American Federation** has worked for over 18 years in partnership with the Census Bureau as a Census Information Center, to ensure that Asian Americans are able to access and use Census data to advocate for their communities. We have led efforts in New York City to ensure that Asian New Yorkers fully participate in the past two decennial censuses. The Census and the American Community Survey are some of the few surveys in American society that produce data of the wide diversity of Asian groups that now reside in the United States.

Since its inception in 1984, the **Asian American Lawyers Association of Massachusetts** ("AALM") has devoted its energy and resources to serving the Asian American legal community and improving and facilitating the administration of law and justice. AALAM serves as a professional and social network for its over 300 members who include lawyers, judges, law professors, and law students.

Asian Americans Advancing Justice – Asian Law Caucus ("Advancing Justice – ALC"), founded in 1972, is the nation's first legal and civil rights organization serving Asian Americans. Advancing Justice – ALC strives to create informed and educated Asian American communities empowered to assert their rights and to participate actively in American democracy. As such, Advancing Justice – ALC has for several decades operated a voting rights and census program that ensures equal access to the ballot and voter registration, language assistance in voting, fair redistricting, and a census that counts all communities accurately.

Since 1985, **Asian Americans United** ("AAU") has existed so that people of Asian ancestry in Philadelphia, Pennsylvania can exercise leadership to build their communities and unite to challenge oppression. We believe that a fair and accurate count of our rapidly growing Asian and Pacific Islander communities is vital to ensure access to needed resources for historically underserved communities. For this reason, AAU stands opposed to the citizenship question on the 2020 Census.

Asian and Pacific Islander American Vote ("APIA-Vote") is a national non-partisan organization that works with local and national partners across America to mobilize AAPIs in electoral and civic participation. APIAVote envisions a world that is inclusive, fair, collaborative, and where AAPI communities are self-determined, empowered and engaged. In keeping with our mission, APIAVote supports actions to expand and protect language access, voting rights, and access to civic engagement for the AAPI community.

The **Asian Bar of Las Vegas** is the oldest and largest non-profit association of attorneys who are passionate about serving the Asian community in the Las Vegas, Nevada area. We support the professional growth and advancement of our members, cultivate an understanding of the issues facing the Asian legal community and the Asian community-at-large, and promote the involvement of our members in the greater community.

Formed in 2006, the **Asian Pacific American Bar Association of Central Ohio** ("APABA-CO") is a non-profit voluntary association for AAPI attorneys, judges, law professors, and law students, and other members of the legal community in the central Ohio area. The goals of APABA-CO include advocating for and serving the legal needs and interests of the Asian Pacific American community in Central Ohio. In furtherance of its goals, APABA-CO opposes discrimination, including on the basis of race, religion, and national origin, and promotes the equitable treatment of all under the law.

The **Asian Pacific American Bar Association of Los Angeles County** is a pan-Asian group of AAPI attorneys in the Los Angeles area. Our mission is to provide a vehicle and forum for the unified expression of opinions and positions by the Association on current social, political, economic, legal, or other matters or events of concern to its members.

The **Asian Pacific American Bar Association of Pennsylvania** ("APABA-PA") has been a legal resource to the underserved AAPI communities of Pennsylvania and a voice for AAPI attorneys, law students and the judiciary across the Commonwealth of Pennsylvania since 1984. The APABA-PA is dedicated to the advancement of its members and the Pennsylvania AAPI communities and the promotion of justice, equity, and opportunity for AAPIs. The APABA-PA opposes discrimination, including on the basis of race, religion, and national origin, and promotes the equitable treatment of all under the law.

The **Asian Pacific American Bar Association of Silicon Valley's** ("APABA Silicon Valley") mission is to foster professional development, advocacy and community involvement for Silicon Valley's AAPI legal community, and to promote justice and equality for all. Formed over thirty years ago, APABA Silicon Valley is a forum for AAPI attorneys in the Silicon Valley to network, develop professional skills, participate in community service, take positions on issues affecting the AAPI community, and empower AAPIs in the Valley.

The **Asian Pacific American Bar Association of South Florida** ("APABA-South Florida") is a non-partisan organization and does not advocate any political beliefs. It is a 501(c)(6) non-profit organization dedicated to representing and furthering the interests of Florida AAPI attorneys, and advocating for the AAPI community at large. APABA-South Florida is dedicated to working towards civil rights reform, combating anti-immigrant agendas and hate crimes, increasing diversity in federal, state, and local government, and promoting professional development. The overriding mission of APABA-South Florida is to combat discrimination against all minorities and to promote diversity in the legal profession.

Founded in 1992, the **Asian Pacific American Labor Alliance** ("APALA"), AFL-CIO, is the first and only national organization of AAPI workers, most of whom are union members, and our allies advancing worker, immigrant and civil rights. Since its founding, APALA has played a unique role in addressing the workplace issues of the 660,000 AAPI union members and in serving as the bridge between the broader labor movement and the AAPI community. APALA works to defend and advocate for the civil and human rights of AAPIs, immigrants, and all people of color.

The **Asian Pacific American Lawyers Association of New Jersey** is the largest specialty bar organization representing the interests of AAPI attorneys in New Jersey. We strive to promote justice, equality, and diversity throughout our state. We oppose

discrimination and racism and work to ensure equitable treatment of all under the law.

Asian Pacific American Women Lawyers Alliance is an organization that promotes inclusion, empowerment, and advancement of AAPI women in the legal profession. Our members include lawyers, judges, and law students throughout California, who share a common goal of protecting and promoting the rights of individuals and communities that have traditionally been underrepresented and marginalized.

Asian Pacific Islander American Public Affairs Association is a national non-profit, non-partisan organization that seeks to empower AAPIs through education, active participation, and leadership in civic and public affairs.

The **Association of Asian Pacific Community Health Organizations** is a national not-for-profit association of 33 community-based health organizations dedicated to promoting advocacy, collaboration, and leadership that improves the health status and access of Asian Americans, Native Hawaiians, and Pacific Islanders within the United States, its territories, and the freely associated states.

The **Austin Asian American Bar Association** ("Austin AABA"), founded in 2006, seeks to serve the AAPI legal community in Austin and the surrounding Central Texas region through advocating for the professional, social, and community interests of Asian American lawyers and the AAPI community. Austin AABA supports equality and justice for all.

The **Bangladeshi American Community Development and Youth Services** works with hard-to-reach low-income Muslim immigrants in New York who feel more at threat by the citizenship question. If the question prevails New York risks a huge undercount.

Formed in 1986, the **Chinese American Bar Association of Greater Chicago** ("CABA-Chicago") is the first local bar association for attorneys of Asian descent in the Chicagoland area. As an organization of attorneys descended from immigrants or immigrants themselves, CABA-Chicago has experienced firsthand the history of American exclusionary immigration laws and the detrimental impact therefrom. CABA-Chicago opposes all forms of discrimination based on race, ethnicity, or national origin.

The **Coalition for Asian American Children and Families** ("CACF") advocates for equity and opportunity for marginalized AAPI children and families. CACF is the nation's only pan-Asian advocacy organization for children and families building an AAPI community too powerful to ignore through: using and sharing information that counters the model minority myth and sheds light on community needs; and mobilizing a coalition of partners to fight for systems and policy change.

The **Connecticut Asian Pacific American Bar Association** ("CAPABA") is the only association geared towards AAPI attorneys in Connecticut. CAPABA's membership consists of attorneys, law professors, law students, and interested individuals. CAPABA stands

by NAPABA in opposition to discrimination, including on the basis of race, religion, and national origin, and in the promotion of equitable treatment of all under the law.

Filipino American Lawyers of San Diego ("FALSD") is a volunteer-based, non-profit organization dedicated to advancing Filipino American legal professionals and the AAPI community. FALSD seeks to promote and advocate the interest of its community by preserving and fostering culture, heritage, and diversity.

Florida Asian Services, established in 2018, is dedicated to advancing civic and political participation and empowerment through citizenship and civic education services, non-partisan voter mobilization and education, community services, and outreach.

The **Greater Orlando Asian American Bar Association** is a voluntary organization that was incorporated on October 19, 2009 to represent the interests of Asian American attorneys, law students, and other legal professionals in the Greater Orlando area.

The mission of **Jacob A. Riis Neighborhood Settlement House** is to build and strengthen under-served communities in Western Queens, New York, and to act as a catalyst for change. Helping immigrants to achieve linguistic, educational, economic, and civic success is a key pillar of what we do and we work with newcomers from around the world, including from East and South Asia, to achieve equity and social justice.

Founded in 1929, the **Japanese American Citizens League** ("JACL") is the oldest and largest Asian American civil rights organization in the United States. The JACL monitors and responds to issues that enhance or threaten the civil and human rights of all Americans and implements strategies to effect positive social change, particularly to the AAPI community.

The **Korean American Bar Association of Northern California** ("KABANC") was founded to encourage and promote the professional growth of Korean-American lawyers and law students in Northern California; to foster networking, support, and the exchange of ideas and information among its members and with the local Korean-American community; and to work with other Asian, minority, and community organizations on matters of common concern.

The **Korean American Bar Association of San Diego** ("KABA-SD") was established in 2007 to, among other things, offer legal, educational, political, charitable, and other services to the Korean American community in San Diego. To further its mission and preserve the cultural heritage of our community, KABA-SD hosts events, such as informational workshops, mentoring programs, fundraisers, and other networking and social activities.

The **Korean American Bar Association of Washington** has a mission to serve the Korean, Korean American, and legal communities as a resource and proponent of the interests, causes and issues that are important for these communities. In addition, we

endeavor to build solidarity with and stand up for other marginalized communities as allies.

The **Laotian American National Alliance** ("LANA") is dedicated to advancing the social and economic well-being of the multi-ethnic Laotian Americans in the United States through civic participation and public policy advocacy.

The **MinKwon Center for Community Action** is the leading Korean American community-based organization promoting civic engagement in the Greater New York City area. The MinKwon Center founded Asian Pacific Americans Voting and Organizing to Increase Civic Engagement ("APA VOICE"), the only AAPI civic engagement coalition in New York; the NYC APA Complete Count Committee; and also the Asian American Community Coalition on Redistricting and Democracy ("ACCORD").

The **National Asian Pacific American Women's Forum** ("NAPAWF") is the only national, multi-issue Asian American and Pacific Islander women's organization in the country. NAPAWF's mission is to build the collective power of all AAPI women and girls to gain full agency over our lives, our families, and our communities.

The **National Asian Pacific Bar Association, Hawaii Chapter**, is a Hawaii association of over 80 AAPI attorneys, judges, and law professors.

The **National Coalition for Asian Pacific American Community Development** is a progressive

coalition of local organizations that advocate for and organize in low-income AAPI communities and neighborhoods. We strengthen and mobilize our members to build power nationally and further our vision of economic and social justice for all. We advocate for and on behalf of low-income AAPIs and promote an inclusive democracy that does not discriminate on the basis of race, age, gender, immigration status, and language proficiency.

The **National Council of Asian Pacific Americans** is a national coalition of 33 AAPI organizations striving for equity and justice by organizing our diverse strengths to influence policy and shape public narratives. Our coalition members work together on policy issues that are deeply tied to our communities, ranging from civil rights, education, health, housing, economic justice, and immigration.

The **National Filipino Lawyer Association** ("NFALA") is the national voice for the Filipino American legal profession and is comprised of members throughout the United States, with the shared goal of increasing its national growth, impact, and visibility while also celebrating its members' cultural heritage. NFALA advocates for justice, civil rights, and equal opportunity for the Filipino American community.

Founded in 1994, the **National Korean American Service & Education Consortium's** ("NAKASEC") mission is to organize Korean and Asian Americans to achieve social, racial, and economic justice. NAKASEC has encouraged community participation in the last

two censuses, and objects to questions added to the census that will discriminate against any community members.

New Mexico Asian Family Center serves the pan-Asian population in New Mexico and its mission is to provide culturally sensitive programs and services creating a pan-Asian community that advocates for and supports itself. Our focus is on domestic violence and sexual assault survivors, and we offer advocacy, counseling, and legal services.

OCA – Asian Pacific American Advocates ("OCA") is a national membership-driven organization of community advocates dedicated to advancing the social, political, and economic well-being of AAPI communities. Founded in 1973, OCA is a 501(c)(3) national non-profit, membership-driven organization based in Washington, D.C. with over 50 chapters and affiliates around the country.

The **Oregon Asian Pacific American Bar Association** ("OAPABA") is the Oregon affiliate of NAPABA. OAPABA's mission is three-fold: (1) Advancement: to promote the professional development and advancement of AAPI attorneys through education, research, and programs; (2) Advocacy: to act as a vehicle and forum for expressing opinions on matters of concern to AAPI attorneys and our communities; and (3) Communication: to encourage and foster communication among AAPI attorneys on issues affecting our work, communities and government.

Pan Asian Lawyers of San Diego ("PALSD") is a non-profit, non-partisan organization which seeks to promote the needs of Asian Americans in San Diego. For over 40 years PALSD has advocated for the advancement of Asian American legal professionals and represent the interests of the Asian American community.

Pilipino American Unity for Progress, Inc. ("UniPro") is a national 501(c)(3) organization committed to organizing, building, and empowering the Pilipino American community in and around our chapters in New York, San Diego, Chicago, Seattle, and Texas. UniPro has served our communities by creating safe spaces with other organizations, and educating others about issues, topics, and concerns affecting our community. UniPro opposes discrimination, including on the basis of race, religion, and national origin, and promotes the equitable treatment of all.

The **Sacramento Filipino American Lawyers Association** is a non-profit organization composed of attorneys, law students, and individuals, dedicated to representing and advocating for the interests of Filipino American attorneys and the Filipino American community in the Sacramento, California region. It also serves to provide a vehicle and forum for the unified expression of opinions and positions regarding current social, political, economic, legal or other matters or events of concern to its members.

The **Sikh American Legal Defense and Education Fund** is a national Sikh American media, policy, and

education organization. Our mission is to empower Sikh Americans by building dialogue, deepening understanding, promoting civic and political participation, and upholding social justice, and religious freedom for all Americans.

South Asian Americans Leading Together is a national, non-partisan, non-profit organization that fights for racial justice and advocates for the civil rights of all South Asians in the United States. Our ultimate vision is dignity and full inclusion for all.

The **South Asian Bar Association of North America** ("SABA North America") is a voluntary bar organization that serves as an umbrella organization to 26 chapters in the United States and Canada representing over 8,000 lawyers, judges and law students. SABA North America is a recognized forum for the professional growth and advancement for South Asian lawyers in North America and promotes the civil rights and access to justice for the South Asian community.

The **South Asian Bar Association of Northern California** was founded to ensure that Bay Area South Asian lawyers were provided an avenue to develop professionally, network among peers, and volunteer within the South Asian community.

The **South Asian Bar Association of Southern California** ("SABA-SC") strives to promote the professional development of South Asian lawyers and law students, educate the community about legal issues, and expand and enhance business and professional opportunities for South Asians. SABA-SC serves Los

Angeles and Orange Counties, and is one of the oldest and largest South Asian bar associations in the country.

The **South Asian Bar Association of Washington** ("SABAW") is an organization of South Asian legal professionals in Washington State dedicated to providing access to legal resources and support for issues relevant to the South Asian community. SABAW is also committed to identifying and advancing the areas where economic, social, and political interests intersect with South Asian legal issues. SABAW serves as a liaison between South Asian legal professionals and the legal community at large.

The **South Asian Fund For Education, Scholarship and Training's** mission is to educate and integrate underserved newcomers, usually South Asian immigrants, into the civic and economic life of New York City.

Southeast Asia Resource Action Center ("SEARAC") is a national civil rights organization that empowers Cambodian, Laotian, and Vietnamese American communities to create a socially just and equitable society. As representatives of the largest refugee community ever resettled in the United States, SEARAC stands together with other refugee communities, communities of color, and social justice movements in pursuit of social equity.

The mission of the **Southeast Asian MAA Coalition, Inc.** ("SEAMAAC") is to support and serve immigrants and refugees and other politically, socially, and

economically marginalized communities, as they seek to advance the condition of their lives in the United States. SEAMAAC has worked for 30-plus years with many hard to reach communities, including refugees, immigrants, and low-income residents in Philadelphia.

Organized in 1975, the **Southern California Chinese Lawyers Association** provides mutual support for Chinese and Asian American lawyers, jurists, and law students in Los Angeles and Orange counties. We work to: (1) advance the professional growth and interests of Chinese and Asian American lawyers, jurists, and law students; (2) improve the access of the Chinese and Asian American community to legal services; and (3) promote the interests of the Chinese American and broader AAPI communities.

The **Taiwanese American Lawyers Association** ("TALA") is the national association of Taiwanese American attorneys. Since its inception, TALA has served as the national voice for Taiwanese Americans in the legal profession and has promoted justice, equity, and opportunity for Taiwanese Americans. In furtherance of its mission, TALA opposes discrimination, including on the basis of race, religion, and national origin, and promotes the equitable treatment of all under the law.

Treatment Action Group ("TAG") is an independent, activist and community-based research and policy think tank fighting for better treatment, prevention, a vaccine, and a cure for HIV, tuberculosis, and hepatitis C. Inequities in access to care for AAPI Americans

already drive huge disparities in the HIV, tuberculosis, and hepatitis C epidemics. As champions of efficient and equitable public investments in health and well-being, we are extremely concerned about the potential impact of a citizenship question.

The **Vietnamese American Bar Association of Southern California** is an association of attorneys, judges, law professors, and law students that provides a network for its members and affiliates with practice settings ranging from solo practices to large firms, corporations, legal services organizations, non-profit organizations, law schools, and governmental agencies.